PROBLEMS OF TRIAL BY JURY

By James E. Babb

No person can pass from the praise of trial by jury delivered by Sir William Blackstone, and recorded in the *Federalist*, Elliott's debates and the other discussions at the time of the adoption of the Constitution, to the criticism found in the discussion of the last ten or fifteen years, without a fixed impression that a most serious change has taken place in a vital function of government. (*World's Work*, vol. 13, 8221; *Arena*, vol. 33, 510; *Harper's Weekly*, vol. 49, 1005; *Century*, vol. 59, 802; 29, *Munsey*, 723; 77 *Nation*, 106; 5 *International*, 1; 87 *Nation*, 163; 62 *Gentlemen's Magazine*, n. s., 189; 22 *Arena*, 312; 98 *Spectator*, 890; 3 *Forum*, 102; 9 *Forum* 309; vol. 1, Report of American Bar Association, 1906, 450; Report of American Bar Association 1905, 15 to 32; Report of Universal Congress of Lawyers and Jurists 1904; 96; 17 *Law Quarterly Review*, 171, Address of James Bryce, American Bar Association, 1907).

Intermingled with criticism are comments of a more favorable character from men of eminent qualifications, both of equipment and experience. (Report of Universal Congress of Lawyers and Jurists, 1904, p. 105; Address of Joseph Choate before the American Bar Association in 1898).

Reading the criticisms that have been made creates a firm conviction that there has been much of error and wrong in trial by jury.

So great has this been that some, among them even a distinguished ex-attorney-general of the United States have called for its abolition.

These criticisms most generally pertain to trials in civil cases though some of the most serious instances given of miscarriage of justice were in criminal cases.

The growth of democracy from the time when jury service was almost the exclusive official function of the people, to the present, when after over a century of exercise of the elective franchise, the people are demanding direct participation in legislation through the referendum and in nomination of candidates for office and the adoption of political platforms and choice of United States senators, and even the

extension of trial by jury to additional classes of cases, argues that trial by jury will exist as long as popular government.

A theoretically perfect trial is no more to be expected by a jury than theoretically perfect government is to be expected in a democracy, unless the democracy be one ideally perfected in intelligence and morality. From such trials and from such government we get the product, not of the most skilled, but only of the average man, the development and perfection of whom is the chief object of our institutions.

We find, therefore, perhaps no more of error and wrong taking place in trials by jury than are found in our legislatures, executive and administrative officers. In the largest sense, therefore, fundamentally the difficulties which we meet in the jury system are met in every department of government, and the fundamental remedy for these defects is the intelligence, morality and fidelity of the people, for which we must look to the home, the school and the church. No class can be immune from the effects of the votes of electors and jurymen. The production of a high grade of average man is our salvation.

Coming directly to the machinery applicable to the jury system alone, the evils are a combination of defect in regulation and administration, and the chief of these, which in some instances is a defect of regulation, and in others of administration, is the desertion of jury duty.

In many, and doubtless most, of the States men occupying the higher positions in all lines of activity have successfully, and practically totally, evaded jury service, and from this class, has come the main criticism upon jury trials. They seem to have overlooked the fact that the criticism aimed at others must necessarily rebound upon themselves; that if they had discharged their duties, almost every jury would contain upon it sufficient of them to prevent, in any case, a verdict representing in an extreme sense, class, corporate or social prejudice, or bias, or misconception of the evidence. While the law contemplates a fair distribution of jury service, it will be found that the officers having to do with its execution, find themselves under severe criticism if they force upon the jury list a man whose time is of unusual value, and at the same time these officers selecting such a man for jury service would receive additional criticism from the professional juryman, who has been watching for the place and who has thus been displaced. The officials having to do with the selection of jury lists have found the burden of double criticism too much

endangers success at the primaries and elections, and aided, as well, by a spirit of accommodation, have drifted into the practice of passing over the names of those who would be offended at being called, and of placing upon the lists those who would consider the opportunity one of comfort, satisfaction and profitable employment, and occasionally, perhaps, and there is always a possibility that considerations much more dangerous control the officer's discretion.

In this we have the chief cause of current failures in jury trials. This disloyal, and rather discreditable desertion of public duty has found excuse, not only, in serious interference with important business duties, but in the almost barbarous, as well as unhealthful, treatment to which the juror in service is subject, also in the insufficicient compensation which attaches to the service.

The service is one, unavoidably, most arduous, and inconvenient. It comes of a sudden, it is so temporary as not to justify sufficient preparation for its interferences with other duties, and at times it subjects to a life, practically of imprisonment. It is a duty, however, fundamental and essential and not to be evaded, any more than military service in time of war. This desertion of jury duty is similar to that of electors in failing to register and vote. In a popular government the discharge of these duties is vital and must be exacted. In time of war all expect, and readily submit to the propriety of the most instant and severe punishment of the smallest infractions of military duty. We have failed in the conception that there is ordinarily as much of importance dependent upon the proper discharge of the duty of elector and of juryman as there is upon the discharge of picket and other military duty in time of war. Our government never can meet its responsibilities until there is a common understanding and recognition that the duties of jurymen and electors are as sacred, as important, to be enforced as instantly and with punishment as adequate, as that administered for the enforcement of military duty. This evasion of service has created and brought into existence the professional juryman.

The difficulty must be reached by an amelioration of the conditions of jury service and the prevention of its further evasion. There is not in the realm of public questions anything of more importance than this feaure of the subject under consideration. Beneficial influences, upon the bench and the bar would result from the improvement of the personnel of the jury box. Would not the judge and the lawyer, the witness and the client, be more attentive to their conduct and

proceedings if they found in the jury box a larger representation of the intelligence, the wealth and the power in the community? Would not the bench, the lawyer, and the other participants in court proceedings be made to feel, from this class in the jury box, their open resentment of everything smacking of shystery or dilatoriness in the proceedings of the court?

In this way the questions in the discussion of which the public is arrayed, involving class and social and other strife and prejudice, would come up for consideration in the jury room when all classes were represented and the education and understanding growing out of the discussions there to be had, hand to hand and face to face, could not but help to bring about an easier solution of the refractory questions in our social, commercial and public life.

The conviction is general among lawyers that many verdicts are rendered upon considerations entirely foreign to the evidence and law of the case. It is not unlikely that many verdicts have been produced by an indisposition of jurymen to be kept out all night, sleeping upon the floor or upon benches, in order to reduce the amount of damage or punishment that may be imposed upon some individual or corporation they dislike. There are many considerations that arise from the peculiarities of cases that are submitted to jurymen which give large opportunity for influence of collateral considerations, in the way of preconceptions, biases, prejudices and matters of expediency. The verdict of the jury is general in terms, rendering it impossible to determine what considerations have produced it. In a number of the States statutes have been passed requiring jurymen in returning a general verdict to answer specific questions as to their findings on particular facts, such questions to be submitted by the court at the request of counsel for the parties, respectively. The courts have quite generally construed these statutes as leaving it discretionary with the trial court whether particular questions shall be submitted for answer by the jury. The trial courts have so uniformly exercised the discretion to refuse any such interrogatories, that attorneys have found it practically a waste of time to request the submission of special interrogatories. There is no practice that would tend more to eradicate improper considerations from the formation and rendition of verdicts than the practice of requiring jurymen to respond with answers to specific questions that may have been submitted to them. A jury that will drift away under a multitude of considerations from the merits of the case and render a general ver-

dict from considerations entirely foreign to the merits of the case, will not fail, however, to respond correctly and faithfully in answer to any specific question of fact or individual circumstance involved in the case that may be submitted to them for answer. When a general verdict is brought in with answers to specific interrogatories concerning material facts in the case, if the general verdict is found by the court to be contrary to the judgment which should be rendered upon the facts as specifically reported in answer to interrogatories, the court is then enabled to render a correct judgment in the case, even if it be in opposition to the general verdict which the jury may have returned. The objection to this practice is that it will for a number of years at least, until the practice has been reduced to a perfected system of rules, and possibly always, tend to occasion more new trials and more reversals in the supreme court. This, while a serious objection, is not determinative. The State cannot afford to allow injustice from erroneous verdicts from any consideration of mere convenience or expense.

Where honor, life, liberty or the accumulations of industry and economy are in controversy a second trial is not an undue expense, (Joseph Choate, before American Bar Association, 1898), because "justice is the great interest of man on earth." Wholesome public policy requires provision whereby every wrong, however slight, may be promptly righted and that wrongs should be righted rather than compromised or go unpunished for any reason of policy or convenience (Von Ihring's *Struggle for Law*).

An examination of the reviews of legislation published by the University of the State of New York from the year 1890 discloses that very little attention has been given to legislation concerning fundamental regulation of juries, except that in a few States within recent years a determined effort has been manifested to abolish the professional juryman by extending the time within which a juror is ineligible after having once served. Radical legislation along this line will assist in forcing upon the list the man who has escaped jury service.

An overhauling of the subject of law and administration of the jury system is too much for individual effort and is the more complicated, as discovered at the adoption of the Constitution, by reason of different practices and local conditions in each of the States, the coöperation of all of which is required for an effective reformation. The subject is fit for the uniform law commissions, established in a number of the States, and the uniform law committee of the American

Bar Association. A general committee might collect the legislation and court rules of the States and territories and foreign countries and the great volume of discussion in lay and professional periodicals, and assort and distribute the information to a large number of subcommissions having to do with subdivisions of the general question. These subcommittees, after correspondence with sources of experience in the various States and countries upon their particular subjects, could send up to a general committee a set of drafts of legislation which might by the general committee be put into a code for uniform adoption. Such an undertaking could only progress gradually and would be many years in its final accomplishment. It would meanwhile be greatly assisted by, and would greatly assist, any individual effort, in the various States, in the correction of particular abuses.